Central Law Journal.

ST. LOUIS, MO., OCTOBER 11, 1912.

RESPONSIBILITY OF TELEPHONE COMPANY FOR INJURY TO THIRD PERSON BY INDIVIDUAL WIRE OF PATRON.

The facts in the case of North Arkansas Telephone Co. v. Peters, 148 S. W. 273, decided by the Supreme Court of Arkansas, show, that a telephone company had its plant and system in the town of Fayetteville and operated within its corporate limits. A rural customer was let into the service upon condition that he would construct his own line from his residence, so as to connect it with the company's wire, and would pay for all repairs the company made to keep it in proper condition, the company to install a telephone at his house. The line got out of repair and the wire hung so low that a traveler on the highway was caught at night, under the chin, and thrown down in his wagon, suffering some injury. He sued the owner of the line and the telephone company and a judgment recovered against both was affirmed by the Supreme Court.

The opinion does not particularly discuss the liability of the rural owner, and says, the question of the liability of the company had given the court the gravest concern and that for its solution, "after a somewhat careful search for authorities bearing on the question," the court had not been able to find any.

The court says: "The line was used by the telephone company to serve Stuckey as one of its subscribers and he paid the customary rental therefor. The telephone wire which injured the plaintiff was constructed and used for the joint benefit of the telephone company and Stuckey, and it cannot, therefore, be said that there is no evidence to show that the telephone wire was not under the control of the telephone company."

The opinion concludes by saying: "The wire which injured the plaintiff was constructed by Stuckey and owned by him; but was operated by the telephone company for the joint use and benefit of itself and Stuckey upon an agreement to do so. Hence they are joint tort-feasors and were properly joined in this action."

We think the excerpts above quoted are about as irreconcilable as two sentences intended to be consistent could be. If the former describes the situation, Stuckey ought not to have been held liable, unless any subscriber in Fayetteville might be, so far as injury would come from his connecting wire is concerned. Who constructs such a wire has nothing to do with the case. The question was who was bound to maintain the wire, and there seems to have been direct testimony that the rural customer was to do this and not the company.

We are prepared to admit that, so far as anyone might suffer injury from electricity supplied by the company over this wire, it would be guilty of negligence in not seeing that the wire was properly maintained, but the injury suffered was not in this way, nor does it appear that any electrical current caused the wire to sag.

The principle decided by the Arkansas court is broad enough to make a railroad responsible for the bad repair of a branch line owned by an independent company, or a boat line, for defective vehicles running between its wharf and a hotel.

In this case the party served was outside of the zone of operation in the regular way and the company as to him was not a public agency. It was acting in a purely private capacity. The service it was generally giving was confined to the corporate limits of Fayetteville, that is to say, the rural customer connected himself with its wires. When he talked from his residence the current of sound, so to speak, was conveyed by him to the company wire and thence flowed to a destined point, and *vice versa*, from this point the current was taken to the end of the company wire and flowed on in the rural owner's channel to his residence.

Suppose an irrigation company supplied water to an independent ditch company, and, incidentally, agreed to repair the latter's ditch at the latter's expense and in addition rented to it patented meters, would the former be liable for negligent acts of the latter? Surely not. But how does this hypothetical case differ from that before the Arkansas court, except upon the supposition, that a dangerous element may have been agreed to be released from the company wire? But the case was not treated from this aspect.

The case we consider is perhaps not greatly important, as we believe no one, not even the court which decided it, would admit it to be similar to the case we have supposed. But it does seem not out of place to call attention to what seems to us a failure to look for general principles in disposing of a controversy.

The court says it has not been able, "after a somewhat careful search for authorities on the subject," to find any. If our view is correct, there ought to be an abundance of authority under the heading independent contractors and when liability attaches to others for their acts. Instead of that, however, the court overrides undisputed testimony that the rural owner constructed the line and was to keep it in condition. This was equivalent to saying that no matter what the contracting parties agree on as to this branch line, the jury could interpret that contract to suit themselves.

Again as to the joint tort-feasor question. How may the court's conclusion stand except upon the dangerous element theory? If the company were held liable because it was in control of maintenance, then the rural owner had no liability. If the owner was in control of maintenance, how would liability of the company arise?

Let it be remembered there was not a word said about joint control. The court says, as the rural owner constructed and owned the line and the company operated it "for the joint use and benefit of itself and Stuckey upon an agreement to do so," this made them joint tortfeasors. We deny that the premise, as applied to the facts, contains any such conclusion. Under the view of company liability Stuckey was simply a renter of a telephone, and under the view of liability of Stuckey he was merely paying for power over the instrumentality whose condition brought on the injury. They stood to third persons not in association but at arms' length as contracting parties. It was the company's line or it was Stuckey's line or a line leased by Stuckey for use by the company. They were not in joint possession.

NOTES OF IMPORTANT DECISIONS.

CARRIERS—RESPONSIBILITY FOR ACTS OF INSANE EMPLOYEE.—The Kentucky Court of Appeals holds that by the great weight of authority the law is well settled that an insane person, to the extent of compensation is just as responsible for his torts as a sane person, except, perhaps, those in which notice, and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. It is said that some of the courts base the doctrine upon the principle, that where one of two innocent persons must bear a loss, he must who causes it. And some give as additional reason that public policy requires the enforcement of the liability, so that relatives of a lunatic may be under inducement to restrain him, and further it is a convenient way to provide against simulation of insanity. Chesapeake & O. Ry. Co. v. Francisco, 148 S. W. 46.

Neither of these reasons seem at all of a scientific kind, and the courts that distinguish between mere negligence and malice seem to have less of logic in the matter than the others. Negligence is but the abandonment of care, and care is the characteristic of a rational being, precisely the same as responsible malice is that of a rational being. It all comes back to the nonfulfillment of duty that is owed to another, and malice is but an aggravation of the nonfulfillment.

But the court says: "If an insane person is liable in compensatory damages for an injury inflicted by him, we perceive no good reason why the master should not be held liable for the tort of an insane servant while acting within the scope of his employment and engaged in attending to the master's business.

Though the person injured and the master may both be innocent, yet it is the master's servant who causes the injury, and therefore the master should bear the loss."

We do not think, even if the predicate be true, that the master necessarily is liable. Suppose a servant is performing a duty and injury ensues because he is stricken with sudden blindness or paralysis; would not this be an act of God? If insanity suddenly bereft him of necessary intelligence to perform the duty, would not this be an act of God?

Where is there a difference? Intelligence is as tangible a necessity as eyesight or strength and the visitation of loss would seem much the same as if lightning had struck an engineer at the throttle, if that caused a wreck.

THE WRIT OF PROCEDENDO.

There is no way for a litigant to get justice in the courts unless he can at least get a trial and decision of the issues properly brought before the court for determination. If, therefore, the tribunal to which he is entitled under the law to appeal for a redress of his grievances should arbitrarily or otherwise refuse to proceed with the cause to a determination, he would be without a remedy. This condition of things would, of course, militate against the fundamental maxim that the law affords a redress for every wrong. So, where the court in which an action is properly brought, refuses to hear and determine the issues, the writ of procedendo is available to set the machinery of the recalcitrant court in motion. "A procedendo is a writ commanding an inferior court to proceed to judgment. It gives no judgment, but directs one."[1] In this country courts of last resort are usually given by the organic law superintending control over inferior courts and authority to issue writs of quo warranto, prohibition, mandamus and other remedial writs and orders not only in aid of their appellate powers but in original actions when this is necessary to preserve a right or privilege guaranteed by the law. A court having authority to issue the writ under discussion must confine its order to a direction to the inferior court to proceed to judgment, and it never directs the lower court to render judgment for or against either party litigant. For this is not either the purpose or office of the writ. It is merely to stimulate the activity of the dormant court and require it to proceed in a way and to an extent that the appellant rights of the parties may be assured in the due and orderly course of procedure.

The remedy authorized by this writ is frequently given under the name of mandamus; but there is no particular magic in words, and it matters little whether one or the other term is used since the remedy consists of an order of a court having authority and jurisdiction to require the trial court to obey its direction to proceed. This remedy is available in a case where a judge refuses to take jurisdiction of a cause because he thinks himself disqualified under the law when in fact he is not.[2] If the judge is not, in fact, disqualified, it is his duty to proceed to trial, for the judge who may be substituted in case of disqualification is himself disqualified if the regular judge is not. Where a circuit court of the United States improperly remanded a cause to a state court, the supreme court held that the circuit judge could be compelled to take jurisdiction and proceed with the trial, since the order remanding the cause was not appealable.[3] Likewise in an action where a railroad attempted to condemn land which was not subject to condemnation and the defendant filed an answer in the law court setting up facts which were inconsistent and incompatible with the right of eminent domain in the particular case and setting up equitable defenses which entitled him to an injunction and the action was transferred by the law court to the chancery court under statutes authorizing this procedure, and where the chancery court refused to take jurisdiction and sent

(1) Yates v. People, 6 Johns. 337, 463; People v. Sexton, 24 Cal. 78, 84; 3 Bl. Comm. 109.

(2) State v. Young, 31 Fed. 594.

(3) Chicago & A. Rd. Co. v. Wiswall, 23 Wall. 507, 508.

the cause back to the law court, the order transferring the action to the law court not being appealable, it was held that the chancery court could be compelled to proceed by an order from the supreme court granted upon an original petition in that tribunal for the writ.[4] Where, for any reason, an inferior court improperly refuses to take jurisdiction or, having properly assumed jurisdiction, improperly refuses to proceed in the cause to judgment, it may be compelled to do so by a higher court having a superintending control over the lower.[5] But where a court once takes jurisdiction of an action and upon the trial it is dismissed because a litigant does not comply with the reasonable and lawful rules of practice which entitle him to a hearing, he has no right to ask a higher court to compel the lower to proceed. Courts ordinarily have inherent power to establish reasonable rules of procedure which are not in conflict with the law, and these cannot be evaded by a resort to an application for a writ of procedendo. The remedy, in such a case, if any, is to appeal from the adverse ruling.[6] But the remedy may be invoked where the court has ruled adversely to the complaining party on demurrer and no appeal from this ruling is allowed by the local law.[7] But, of course, if the ruling on demurrer were correct the writ would not be available. Generally, where an appeal from the order refusing to act would be useless and there is no other remedy, procedendo may be invoked.[8] The utmost good faith of the court refusing improperly to proceed will not avail to defeat the writ, for the litigant cannot be deprived of his constitutional right to a trial by an erroneous idea of the law on the part of the court. "The court cannot, by holding without reason that it has no jurisdiction of the proceedings, divest itself of jurisdiction and evade the duty of hearing and determining it."[9] This rule is restricted, however, to questions of law. For if the jurisdiction should hinge upon a question of fact upon which issue there was evidence both ways in the trial court, procedendo would not lie to compel the court to proceed, since this would be controlling the court upon the decision of a question of fact before the cause got to the appellate court.[10] And this rule has been applied where a cause was transferred from a state to a federal court upon a showing susceptible of a construction which would warrant the removal.[11] This ruling is evidently correct for, as the learned court said, "Should this court interfere by peremptory mandamus to compel a district court to proceed to a trial and determination of a cause, after such district court had, upon petition, removed the cause to the United States Circuit Court a serious conflict of jurisdiction might arise."[12] Of course, the higher court will not compel the inferior tribunal to proceed if the pleadings show that the party seeking this remedy is not entitled to any relief.[13] But "the writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in due exercise thereof."[14] Thus, in a case in Michigan where the statute provided that in an action in justice court where the title to land becomes involved, the cause shall be certified to the circuit court; in a case thus certified the circuit court found that the title to land was not involved and refused to take jurisdiction and decide the case on the merits. The supreme court held that this ruling was wrong and that the circuit court should be

(4) Gilbert v. Shaver, 91 Ark. 231, 238; and see Pope v. Vaux, 2 Wm. Bl. 1060; Fazakerly v. Baldoe, 6 Mod. 177.
(5) Ex parte Parker, 120 U. S. 737, 743.
(6) Ex parte Brown, 116 U. S. 401.
(7) Beckwith v. Superior Court, 146 Cal. 496, 499.
(8) Cahill v. Superior Court, 145 Cal. 42, 44; Gilbert v. Shaver, 91 Ark. 231.
(9) Gilbert v. Shaver, 91 Ark. 231, 239.
(10) Gilbert v. Shaver, 91 Ark. 231, 238-9; Cahill v. Superior Court, 145 Cal. 42, 44.
(11) Francisco v. Ins. Co., 36 Cal. 283, 287.
(12) Francisco v. Ins. Co., 36 Cal. 283.
(13) Beckwith v. Superior Court, 146 Cal. 496, 499; Woodstock v. Gallup, 28 Vt. 587, 592.
(14) Exparte Parker, 120 U. S. 737; White v. Holt, 20 W. Va. 792, 815.

compelled to proceed to judgment.[15] In other words, it is not so much what the inferior judge thinks of jurisdiction, but whether it actually exists. If it really exists, aside from any disputed question of fact or if it is shown from the undisputed evidence when the existence thereof is a question of fact, the trial court cannot escape the duty of proceeding to judgment and may be compelled to do so by the tribunal having superintending control over its actions.[16] It has been held in Kansas that the judge of a circuit court having jurisdiction of the subject-matter may be compelled by this writ to hear a petition for the enlargement of the boundary of a city.[17] The learned court was also of the opinion that, if the duty which the court had been called upon to perform were legislative and not judicial, the writ could not have been invoked. But if the courts in Kansas can exercise legislative powers, they have a very extraordinary condition of things there which is quite different from that which generally obtains in those numerous jurisdictions where all governmental functions are separated into three general divisions, legislative, executive and judicial, none of which has any right or power to encroach upon the affairs of the other.

It has been properly held that the writ is available where an intermediate appellate court improperly dismisses an appeal. For this kind of an order or judgment operates to leave the judgment appealed from in force and deprives the litigant of the right to have a determination of his cause by the higher court, and as he would have no remedy if it were not for a proceeding of this kind, he is entitled to an order commanding the lower court to try his cause.[18] The fact that a decision may be had earlier by resort to this writ than by the usual mode by appeal will not justify its issuance. The right to a speedy trial means, ordinarily, at least, a trial as early as can reasonably be had with the means and in the manner provided by law therefor.[19] Of course, if a litigant should lose his right of appeal because of his own fault he could not escape the consequences of his own negligence by a resort to this remedy.[20] In England a statute authorizes the court of King's Bench to issue a rule on justices of the peace compelling them to proceed where they refuse to do so by reason of some liability arising upon their action. When thus ordered to proceed by the King's Bench, they are thereby protected from the liability they would otherwise incur.[21] Where a question arises as to the constitutional authority of a court to determine a certain cause, and the higher court decides that the lower court has authority to hear and determine the issues pending before it, the inferior tribunal may be compelled to proceed if it then refuses to do so, for this would be tantamount to a disobedience of a mandate of the appellate court on reversal or modification of a judgment of the trial court and a direction to proceed therein in accordance with the ruling of the higher court.[22] Ordinarily, a writ of error or appeal will not lie to reach the remedy which this procedure affords; for procedendo is invoked when the court will not proceed to trial and, as a general rule, there can be no appeal from a mere refusal of a court to act, since no adjudication upon the merits

(15) Taylor v. Montcalm, Judge, 122 Mich. 692. See, also, Temple v. Superior Court, 70 Cal. 211; Hill v. Morgan, 9 Idaho, 718, 726; Gilbert v. Shaver, 91 Ark. 231.

(16) Floral Springs Water Co. v. Rives, Judge, 14 Nev. 431, 433.

(17) Emporia v. Randolph, 56 Kan. 117, 119.

(18) State v. Smith, 172 Mo. 446; Valley Turn Pike Co. v. Moore, 100 Va. 702, 707.

(19) State v. Hadley, 20 Wash. 520, 522. It is intimated in this case, however, that if the delay necessarily incident to the ordinary appellate procedure would operate to the denial of justice or a substantial right, the writ might issue. But this is not very plausible for in the last analysis the cause would still have to get to the appellate court in due course, since the writ of procedendo or mandamus ordering the court to proceed could not direct any judgment to be rendered in the lower court one way or the other. If the lower court improperly refused to proceed, it could be compelled to do so, and if it did proceed as the law requires, the writ would have no office to serve.

(20) State v. Moore, 21 Wash. 629, 631.

(21) Queen v. Percy, L. R. 9, Q. B. 64.

(22) Cowan v. Fulton, 23 Gratt. (Va.) 579.

is thus reached.[23] Neither can the writ be sought to obtain any relief which might regularly be had by an appeal or writ of error to a higher tribunal.[24] In short, the writ will never be issued when the litigant seeking it has "a plain, speedy and adequate remedy in the ordinary course of law."[25] Any order or proceeding, therefore, which, by law, can be appealed from by the usual course in appellate procedure must be thus corrected and this writ will not reach the error of an incorrect ruling.[26]

The writ of procedendo is naturally an original action and should be instituted in the court having appellate supervision and superintending control. It is not an appellate proceeding at all, but a procedure originally in the appellate court to obtain the necessary order to the lower court to proceed and hear a cause.[27] This remedy is the reverse of the writ of prohibition. The latter writ forbids a lower court to proceed when it is about to do so without authority of law, while procedendo is to spur the court to action when it improperly refuses to act.[28] The writ is of the utmost importance in instances where it is the proper remedy and large or important interests are involved. Of course it can only be resorted to to require those courts which are not of ultimate appellate jurisdiction. As to the courts of last resort, the writ is impotent, since the ruling of such courts upon all questions, whether right or wrong, is final and conclusive. Doubtless if such a court were to refuse to proceed to an adjudication as it should, the only remedy would be impeachment proceedings, a remedy not altogether satisfactory or certain.

If the lower court should refuse to obey the lawful order of the appellate tribunal and still refuse to proceed, the remedy is obvious. The judge or judges of the inferior court would be in flagrant contempt of the supreme court and could be punished and coerced into submission by fines and imprisonment.[29] Of course, if the contumacious court should be composed of more than one judge only such of the judges as refused to obey the order of the appellate court would be in contempt. But, doubtless, if the recalcitrant court should be thus composed of more than one judge and a majority should obey the order, still if any should refuse to recognize the force and validity of the order of the appellate tribunal, such minority judge or judges would be in contempt, notwithstanding enough of the judges respected the appellate order to control the action of the court which has been ordered by the court of last resort to proceed to adjudication. Of course, the writ would be as proper in a case where a cause had been adjudicated by the appellate court and remanded with certain directions. It would be as much the duty of the lower court to respect and obey this order after a trial in the appellate court and a remanding of the cause as would be the case before the cause got to the court of last resort. Doubtless there might be instances where the order of the appellate court is reasonably capable of more than one construction. If the lower court endeavors in good faith to carry out the order and by a mistake of construction which would be plausible, it could hardly be said that punishment for contempt would be proper.

W. C. Rodgers.

Nashville, Ark.

(23) Yates v. People, 6 Johns. 337, 463.

(24) In re Gravesmayer, 177 U. S. 48, 49; Gilbert v. Shaver, 91 Ark. 231, 238; 3 Bl. Comm. 109.

(25) Francisco v. Ins. Co., 36 Cal. 283, 287; Gilbert v. Shaver, 91 Ark. 231, 238; United States v. Swan, 65 Fed. 647; State v. Hadley, 20 Wash. 520; State v. Superior Court, 20 Wash. 502; State v. Moore, Judge, 21 Wash. 629, 631; State v. Superior Court, 21 Wash. 108; State v. Superior Court, 24 Wash. 438, 439; State v. District Court, 13 N. D. 211, 219; Woodstock v. Gallup, 28 Vt. 587, 592.

(26) State v. Hadley, 20 Wash. 520.

(27) Dakota v. District Court, 5 Dak. 275; Florida v. Reeves, 44 Fla. 179; Gilbert v. Shaver, 91 Ark. 231; Ex parte Henderson, 6 Fla. 279; Temple v. Superior Court, 70 Cal. 211; Woodstock v. Gallup, 28 Vt. 587.

(28) Yates v. People, 6 Johns. 337, 463.

(29) 3 Bl. Comm. 109.

TELEGRAPHS AND TELEPHONES—FREE DELIVERY LIMITS.

WESTERN UNION TELEGRAPH CO. v. HARRIS.

Supreme Court of Texas, June 19, 1912.

148 S. W. 284.

Where a telegraph company establishes free delivery limits in cities and towns, the burden is on it to ascertain whether the addressee of a message sent to one of such cities resides within or without such limits, and to make demand, if necessary, for the requisite fee for delivery beyond the limits, so that, in the absence of such a demand, the duty rests on the telegraph company to deliver the message without reference to the residence of the addressee.

DIBRELL, J.: May Harris brought this action to recover damages of the Western Union Telegraph Company for failing to promptly deliver to her at Christian College, Cardell, Okl., a telegraphic message from Texline, Tex., in form as follows: "Texline, Texas, April 3, 1908. May Harris, in care of C. College, Cardell, Oklahoma. Johnny burned very bad, come at once. [Signed] J. W. Harris." This telegram was filed with defendant at Texline, Tex., at 4:30 o'clock p. m. on April 3d, to be transmitted and delivered to plaintiff at Christian College in Cardell, Okl. The message was received by defendant, and the fee for such service demanded was paid. The message was sent by the father of plaintiff to notify her that "Johnny," her brother, had been badly burned, so that she might come home at once. There was negligence in the delivery of the message, and plaintiff by reason of that fact failed to get home in time to view the body of her brother and to attend his burial, from which circumstances she suffered the damages awarded, $750.

The petition for writ of error presents but one question which we need consider, that upon which the writ was granted. In view of the light in which the case is now seen, it is desirable only to enlarge upon the reason of the Court of Civil Appeals (132 S. W. 876) in sustaining the trial court in its ruling upon the exception to plaintiff to the special plea presented by defendant as a bar to plaintiff's recovery. The special plea to which plaintiff's exception was addressed was that at the time the message was filed with defendant for transmission defendant had established at Cardell, Okl., free delivery limits beyond which it was under no obligation to deliver messages without extra compensation paid or guaranteed to be paid by the sender, and that such free delivery limits were prescribed by a radius of one mile of defendant's office in the town of Cardell. It was alleged that the blank upon which the message was written contained the stipulation that no message without the payment of such special charges would be delivered to any one living beyond such free delivery limits, and the special plea continues in this language: "That such provision of said contract and the free delivery limits fixed in the town of Cardell by virtue thereof were all reasonable and necessary regulations for the prudent and reasonable management of defendant's business; that at the time said telegram was received at Cardell, as the sender well knew the addressee lived far beyond defendant's established free delivery limits, and no charges were paid or guaranteed to insure delivery at such great distance beyond such established delivery limits, and that such fact was unknown to defendant; that, by reason of all of such facts, defendant pleads such provision of said contract in bar of any recovery, and says that by reason thereof plaintiff should recover nothing." The exception sustained by the court and of which defendant complains is, omitting its formal part, as follows: "Because defendant wholly fails to show or allege that it or its agent demanded of the party sending said telegram any extra charges for the transmitting and delivery of said message beyond its delivery limits, and, further, because it was the defendant's duty to request the special charge from the sender to guarantee the delivery and charge of the delivering of the telegram to the plaintiff, and defendant fails to allege or show that said extra charges were demanded by its agent from the sender either at Texline, Tex., or at Cardell, Okl."

We think the Court of Civil Appeals was right in holding that the trial court did not err in sustaining the exception to the special plea, for more reasons than assigned in the exception. The pleading upon which plaintiff's cause of action is based and the undisputed evidence show that the message was sent plaintiff in care of Christian College at Cardell, Okl., and was accepted by defendant in this form. The undertaking, therefore, of defendant was to deliver the message to plaintiff at Christian College, or to some one representing the college for plaintiff. A prompt delivery to either would have been a fulfillment of the contract. It was immaterial where the addressee resided, whether within or without the free delivery district. If she could by the exercise of reasonable diligence on the part of the company

paid or not. The message was directed to her have been found within such free delivery district at the time the message reached Cardell, Okl., it was the duty of defendant to deliver the message, whether the extra fee had been at Christian College and in care of the college; and there is no allegation or intimation in the special plea that Christian College was located without the free delivery district, and hence, if for no other reason than this, we think the special plea was wholly insufficient to present any defense to plaintiff's cause of action. But it is particularly to the grounds urged in the special exception to the pleading that we wish to address our ruling.

(1) We think an important question, not only of pleading, but of substantive law, is presented by the assignment of learned counsel for plaintiff in error. It involves directly what legal rights accrue to telegraph companies by reason of the rule granting them the privilege of establishing free delivery limits in towns and cities of this state, and as to whether or not the burden of ascertaining the addressee who resides within a city or town is within or without the free delivery district and to make demand for the requisite fee rests upon the telegraph company. We think the legal effect of permitting telegraph companies to prescribe reasonable free delivery districts beyond which they are authorized to make an extra charge for delivery messages should and does not affect the question of promptness of delivery, except in those cases where a demand is made on the part of the company for the extra fee, and the sender fails or refuses to pay such extra charge or guarantee its payment. The burden of ascertaining whether the addressee is within or without the free delivery district must rest upon the company where the addressee lives within the limits of a town or city. It is not reasonable to suppose the sender of a message is familiar with the limits of the free delivery district prescribed by the telegraph company. The company forms the free delivery district, and, if it wishes to collect the extra fee, it is incumbent upon such company to ascertain from the sender the exact location of the sendee in the place where the message is to be transmitted. If that be a burden, it rests lighter upon the shoulder of the company than upon that of the sender. The district is of its creation and for its benefit, and we are not willing to say that it is incumbent upon the sender of a message to ascertain at his risk the limits of such free delivery district and tender the extra compensation, but the company must determine that fact from the information in its possession or from such information as may be given it by inquiry of the sender or from other sources and then make demand for the extra charge.

(2) If the addressee lives without the free delivery limits and the sender refuses to pay the extra charge or guarantee its payment, then the company would be justified in refusing to make delivery of the message. Western Union Tel. Co. v. Teague, 8 Tex. Civ. App. 444, 27 S. W. 959; Western Union Tel. Co. v. Swearingen, 65 S. W. 1080; Western Union Tel. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 47; 37 Cyc. pp. 1678-1690.

In discussing this question, Judge Collard in the case of W. U. T. Co. v. Davis, above cited, states the proposition here laid down in a clear manner, which seems to have met the approval of this court: " * * * If the extra charge became material, the company should have inquired as to the fact, so that the sender could be advised of the fact, and pay the same if demanded."

(3) If the special plea in this case is judged by the law as we understand it and as it has been here declared, there is no room for doubt that such plea is subject to the exception urged by plaintiff. The sufficiency of a plea may be tested by a consideration of what proof is required to sustain it. If it be found that certain and definite facts must be established to sustain a certain plea, then it becomes a proper inquiry to ascertain from the pleading itself whether the existence of such facts necessary to constitute the plea as an entirety have been alleged so as to admit evidence to sustain each of such essential facts required to constitute and sustain such plea; the general proposition being that all facts essential to be proven to sustain a plea must be alleged in the pleading.

(4) There being no allegation that a demand was made by the company for the extra charge, and that, such extra charge being demanded, the plaintiff failed to pay it or guarantee its payment, no legal defense was presented to excuse the want of a prompt delivery of the message.

We think the Court of Civil Appeals in affirming the judgment of the lower court properly decided the case, and, so believing, it follows that the judgment of that court should be affirmed, and it is accordingly so ordered.

NOTE.—*Establishing Free Delivery Limits as Affecting Delivery of Telegrams.*—The following cases appear to show generally that, if a telegraph company takes a message for transmission and delivery, it engages to use diligence in the doing of both. Establishing free delivery limits seems to do nothing more than give the right to demand a further charge, as soon as the

fact is ascertained that addressee is outside of them.

In Bryan v. Telegraph Co., 133 N. C. 603, 45 S. E. 938. the sendee lived three miles away from defendant's office, that is to say outside of the town to which a message was sent. The sender did not know this was outside of free delivery limits, but it was shown that the operator at the receiving office where the sendee was living did and yet made no claim for expense of delivery, as he could have done by wiring to sending office. Instead he wired back: "Party not known." It was held there was bad faith which misled the sender and thereby he was given no opportunity to secure delivery outside of free delivery limits. This case shows that when a company takes a message it must act with diligence and good faith or liability will be entailed.

In Bright v. Telegraph Co., 132 N. C. 317, 43 S. E. 831, the addressee lived outside of the corporate limits but within a mile of defendant's office. He was well known in the town and the telephone in the town served his place of business. Though there may have been free delivery limits, messages were delivered outside and charges collected after delivery. The court said: "The contention that Cooper lived beyond the free delivery limits of the defendant at Burlington and therefore the defendant was not bound to deliver the message until the extra charge for delivery had been paid is not tenable. There is no evidence that Mrs. Bright knew that the defendant had any free delivery limits, nor is there any evidence that the defendant demanded of her payment of any extra charge or even informed her that there were free delivery limits at Burlington and that an extra charge was made by the company for delivery beyond those limits." While this ruling, as applied to the facts may have been proper, yet where it was shown the sendee was beyond the corporate limits of a town, there ought to be some presumption that there were free delivery limits and then the burden would shift to show that he was within those limits. A message to one at a town naturally means within the town.

In a later case the sendee lived seven or eight miles from the office, but the message was sent to his nearest telegraph station, where he was well known. It was shown it was the custom at the office *either* to allow messenger boys to deliver messages out in the country and collect from sendees *or* to wire back to sending office that there were delivery charges and advise sender what they would be. It was shown that had either course been taken the charges would have been paid. As neither was taken, it was held there was a *prima facie* case for the jury and it was error to non-suit plaintiff. Hood v. Telegraph Co., 135 N. C. 622, 47 S. E. 607. This case again enforces the theory that a telegraph company having taken a message must do all it reasonably can to deliver and the custom pursued in particular cases should be considered not beyond the requirements of reasonableness.

In Campbell v. Telegraph Co., 74 S. C. 300, 54 S. E. 571, the message was addressed to the sendee at a certain town. He lived about 2½ miles from there. It did not appear that the sender had notice that the sendee lived beyond free delivery limits, though it is not disputed that he knew he lived 2½ miles away from the town. It was held to have been the duty of the sending office to notify the sender that the message would not be delivered unless extra compensation for delivery service was made and payment declined, and it is implied that if the operator did not know addressee was beyond free delivery limits, it was the duty of the operator at the terminus on ascertaining that fact, either to deliver by special messenger or wire back and demand payment for special delivery. This again shows that a company will not be allowed to sleep on a message and thus allow service paid for to result in no benefit, if by diligence this could be prevented.

In Martin v. Telegraph Co., 81 S. C. 432, 62 S. E. 833, what was ruled in Hood v. Telegraph Co., *supra*, about a custom of delivering messages beyond free delivery limits being competent evidence would seem not to be so viewed in South Carolina, as it was ruled that such evidence was not competent unless it is shown that addressee had knowledge of such a custom or that it was so notorious as to presume knowledge. This seems a strange ruling, because what has addressee's knowledge got to do with such a matter? He was not acting, but a duty to find him and deliver him a message was or not that of the company. Unless custom evidence is to show whether the company acted reasonably, it is hard to see how it is pertinent at all. The court, however, held there was negligence where addressee lived in a suburb within a reasonable distance beyond the free delivery limits and his name was in the directory and telegrams were often delivered in the suburbs. Here seems a technical ruling and yet an admission of evidence amounting to less than a custom, which the court considered material to its conclusion.

In these cases there is one principle running through them, and that is a telegraph company having taken a message should act with reasonable care in the matter, and that the establishment of a free delivery zone does nothing more than authorize the demand either at the time the message is sent, or after its receipt at the terminus, of charge for its special delivery.

C.

CORAM NON JUDICE.

ONE-JUDGE DECISIONS—A JUDICIAL VIEWPOINT.

Our editorial of August 2, 1912, on "One-Judge Decisions," has called forth considerable discussion, especially in the states of Kentucky, Alabama, Tennessee, and Louisiana. As a further contribution to this subject we append herewith an open letter to the Alabama Bar from the pen of Hon. Thomas C. McClellan, one of the Justices of the Supreme Court of Alabama, as follows:

To the Bar of Alabama:

I desire to invoke your consideration of, and to invite the prompt expression of your opinion upon, this, to my mind, vitally important feature of the method and means of procedure and decision of appeals in our Supreme Court. The present is a fit and favorable occasion, when the public, as well as the professional, mind is

attentive to the question of a revision, where needed, of judicial methods, etc., to candidly and without hesitation take review of the prevailing system and methods in this court of last resort. If it is not as good and satisfactory, as it should be, its defects should be noted and their remedy promoted. If the system, in the respect to which I shall refer, does not tend to the best, most satisfactory results in so grave a public service, then, obviously, it should be changed. Long observance of a system should, justly, suggest caution before departing from it; but, if it can be readily seen that a system or a part of a system is full of fault, age of observance should not restrain, in any degree, a departure therefrom.

As is well known, only one transcript is afforded this court for use in the consideration and disposition of an appeal. Upon the submission of the appeal, the Clerk of this Court assigns the case to a member of the Court and delivers the transcript and briefs to him. The assignments proceed in rotation, each member of the court receiving his quota of the appeals submitted. Each member of the Court investigates the cases so assigned to him and prepares an opinion therein. Upon the convention of the Justices in consultation, each member of the court, in order of seniority, submits a case, so assigned to him, to the consideration of his associates. He first states the general nature of the case; and, then, if the opinion he has already prepared does not fully disclose the particular question or questions in decision of which he has written, he states it or them and the facts and circumstances out of which the question or questions to be determined arise.

In this connection I may say that every Judge with whom I am now serving, and with whom I have served, and I have no doubt it has always been so in this court, presents to his associates as full, clear, and accurate a statement of the case and of its questions as could be done in the conscientious, impartial, and full performance of that duty. In short, the system, in this regard, is as perfectly and conscientiously observed as is possible under a method which depends almost wholly upon the faithful recital of facts, circumstances, questions and arguments to be considered and revised.

The opinion previously prepared is then read to the Justices in consultation and discussed by them, such reference as the progress of the consultation allows being had to the briefs in the case, though not regularly; and thereafter a vote is taken on its approval, partial or entire as the convenience of disposition of the questions involved may suggest.

It is seen that this method, which is deviated from in a comparatively few cases during a term, contemplates the actual, thorough investigation of an appeal by one member, only, of the court; his associates being, because of obligation to investigate and prepare opinions in their respectively assigned quota of cases, practically restricted, aside from their general knowledge of legal principles pertinent, to what they ascertain (about the litigation, the questions brought up for review and the arguments of counsel pro and con thereon) in and during the consultation upon the case when it is presented to them by a single member who has already written a complete opinion which, if adopted, is ready for deliverance.

This system has been described by many as the "one man decision" method. Whether that designation is perfectly accurate need not be considered; for, in any view of it, the system clearly tends to that result. The matter of a departure from a like system is becoming a question of acute concern in some of the few states in which it now prevails, notably in Kentucky and Louisiana. The obvious faults of the system may be, without attempt at elaboration or full enumeration, thus stated:

1. It individualizes the work of the court.

2. It vests the Justice to whom an appeal is assigned with an undue weight and influence in the consultation with his associates who have not had the like advantage he has had to consider and investigate the record and arguments upon the questions to be determined by that appeal. While it must be a mere matter of opinion, I believe it may be safely said that a really debatable legal proposition is ordinarily advanced four-fifths of the way to a particular prevailing conclusion when only one member of the court has investigated the question and set down in regular form his opinion thereon.

3. It constitutes, by adoption only, the opinion of one Justice the opinion of the Court. And this, with fault 2 above is, in my opinion, the basis for the notion that obtains with some, at least, of the Bar, that there are two grades of responsibility for a decision, viz., the first and highest being upon him to whom the case is assigned and whose opinion is adopted; the second, and in less degree, upon his associates who only concur in his opinion. It would seem that a system that will admit of such an interpretation of its practical operation and allow that graduation of responsibility for its product, in so important a public service, cannot be abandoned too speedily; for it is wrong in essence.

4. It contemplates that the associates of him to whom a case is assigned and who submits it to the consultation will decide questions presented by appeal without being advised firsthand, by their own investigation, of the matter and questions presented, unless, his associates can do the double, and impossible, service of investigating each record and the arguments and also of each preparing for the consultation his quota of assigned cases. The injustice of this system to the members of the Court is apparent.

5. It operates, in a very large per cent of the appeals, to restrict the reading and careful consideration of the briefs of counsel to one member, only, of this court; for it is not possible for a member to read and consider the briefs in cases assigned to his associates, and also, prepare the cases assigned to him for the consultation of the Justices. This, in my opinion, is the chief reason why it has been necessary during the term 1911-'12 for this court to spend upwards of one month of the eight set apart to the term to the consideration of re-hearings; for it seems to be generally understood, and correctly, that applications for re-hearing are read aloud to the Justices in consultation. The practitioner who contributes to the preparation of his briefs on appeal his full measure of mental and physical effort, as well as the merely material equipment which one in his calling must and does, in varying degrees, maintain, is certainly, at least, entitled to a system that

will allow every one of those whose duty it is to decide the contest to have the initial benefit and advantage of what he has wrought out as bearing on the issue or issues the appeal presents.

6. By unwisely individualizing the initial work of the court to the limits which prevail under our present system, the celerity of decision of submitted appeals largely depends upon the individual health, characteristics and methods of the members of the court. Some Judges are slower than others; some are more cautious in attaining conclusions than others; and some are more thorough and exhaustive than others. To commit the advent of an appeal to the consultation of the Justices to such varying factors arising from the personal characteristics or methods or physical condition of the members of the court operates a discrimination between litigants, notwithstanding the rotational assignment of cases, and shifts the responsibility for delay in decision from the court as such to a single member who may be overburdened by taking a succession that was overburdened, or, who is slower in the work or more careful or exhaustive than his associates.

7. And, lastly, it is, at least, calculated to invest the member to whom a case is assigned and who prepares the opinion for submission to the consultation, with a strong, often irremovable, conviction that the conclusion he has attained in his chamber is sound, regardless of the considerations which his associates, who have not had the advantages he has had, think, at least tentatively, should affect the conclusion in the premises. This is undesirable. The vices of the system are serious. They go to the soundness of decision. They invite agreements upon the basis of confidence in a brother Judge's work and conclusion, rather than, as it should be upon a converging of the minds of the Judges to a conclusion drawn from first-hand knowledge of fact and law from record and brief.

Ought an Appellate Judge be necessitated, directly or indirectly, to take part, in the performance of his duty, in a process that affects the rights to life, liberty or property unless he may inform himself, by at least reasonable effort, of what the trial Judge or Chancellor, whose rulings and acts the appellate tribunal is called to review, had before him, upon which to rule or act, and, also, what counsel say for or against the correctness of the rulings or acts of the trial judge or Chancellor?

If it is assumed that for these, or for other, reasons the present system, in this regard, is undesirable and unsatisfactory, the real inquiry is, what practicable change can be made to avoid the deformities in the present method?

The present method's faults lie in the inability of, and the want of opportunity and facilities for, each member of the court to investigate for himself each case. This can, of course, be obviated by either printing seven or more copies of the record, or of so much thereof as is necessary to present for decision the questions sought to be reviewed on appeal, or by abstracting the record as at present prepared by the Clerks and Registers of the state and printing or typewriting, say, ten copies of the abstract, with the right of criticism of the prepared abstract preserved.

In more than thirty of the states of the Union, the records on appeal are either printed or abstracted as indicated; and the Supreme Court of the U. S. and the U. S. Circuit Court of Appeals are afforded printed records.

A leading practitioner in this Court, who has made some investigation, writes me that he is of the opinion that records can be printed for twenty cents per hundred words, if measurably large contracts were made therefor by the state or other proper authority for judicial printing in conveniently arranged divisions of the state. The present cost for transcript making is fifteen cents per hundred words, a difference of five cents between the two processes. An arbitrary fee of, say five dollars a case could be allowed the Clerks and Registers for arranging, general-indexing, and supervising the printing for an appeal. All to constitute cost in the cause.

Fifteen states now have their records on appeals printed. If practicable in our state, it is, obviously, the most desirable method. It is, also, the view of many practitioners, that our present transcripts contain, in very many cases, useless matter, such as extended and continued recitals of the court-organizations, and jury formations; the full setting out of pleadings that might be condensed to accurate statement; and testimony, where a condensed statement of its general effect would suffice in cases not involving error vel non in giving or refusing the affirmative charge. With the records reduced to only that necessary to present the questions to the reviewing tribunal, it is not, in my opinion, an exaggeration to say that, even, if printed records were the rule and they cost twenty-five cents per hundred words, litigants in our Appellate Courts would be subjected as a class, to less expense than that incurred under our present system.

The other system of abstracts, in sufficient number to supply all the Justices and the attorneys, prevails, in somewhat different form, in twenty-three (23) states. Our Bar repudiated the abstract system in the early nineties. An eminent practitioner of those years tells me that he thought the then hostility of the Bar to the system was largely due to the idea that this Court's attitude was thought to be too favorable to the abstract as against the transcript, when the correctness of a given abstract was assailed. In view of the obvious, serious faults of the present method, is it now true that our Bar would prefer to adhere to it rather than adopt a character of system that prevails in twenty-three (23) states of the Union? If the chief objection is that the abstract system entails too much labor on the attorneys, this idea (by no means well-matured) has occurred to me: devolve the duty of abstracting on the Reporter and one or two Assistants (to be provided); put the Reporter and his assistants on a reasonable salary; require the furnishing of copies of the abstracts, as made, to the respective counsel, with time limit for the filing of their criticisms thereof; afford enough copies of the abstract so made and enough copies of the criticisms of counsel to supply the Justices, and affirmatively make the transcript the final arbiter of the correctness of an abstract.

The adoption of either the printed record method or the abstract method will leave the

court wholly free to decide in what cases opinions should be written. All must know that too many opinions are written in cases determined by following repeatedly reported decisions of this Court. Either of these methods would avoid the, perhaps, natural partiality men feel for their product of mind or hands; as also the necessity of the Justices deciding that what one has written in one case should be reported and what another has written in another case is not of sufficient importance to justify its publication. An impartial investigation will, I think, show that a very large percentage of any of the last, say, thirty volumes of our reports is taken up in statements of what has long ago become finally accepted law. In my opinion, the cost to the state of unnecessary printing and Reporter service in the publication of opinions that merely re-iterate, repeat, accepted law, is, at least, six thousand dollars a year, a sum that certainly might be spent to better public purpose. With the reasonable reduction of the Reporter's work in reporting cases, he could then have more time than he now has for reporting and for the supervision of the correct printing of the books, both matters of the gravest concern to profession and people.

It has been suggested that this court could not dispose of its business with reasonable celerity if each member of the court should be required or expected to investigate the record or abstract and briefs of counsel in each case appealed. I do not think this suggestion well-founded.

During the term 1911-'12 there was, I am advised, submitted for decision in the Supreme Court 384 appeals. Allowing for miscounts or for the falling off of appeals during the term on account of political distraction, etc., it is safe to accept 500 submissions as the maximum. Four Hundred Seventy-one cases were decided. In disposing of these probably 95 per cent of them were "stated" in the consultation, in addition to the reading of the opinion, taking, of course, varying periods of time for each case. If each member had been afforded the facility to know the case and argument upon its questions, no "story of the case" nor full recital of the arguments, pro and con of counsel, would have taken that time; and the discussion would have the sooner come down to the debatable, controlling questions in the record. But the suggested inability to dispose of the business under any other method than that now prevailing is fully answered by the actual figures from the Minnesota and other Courts. They have Five Judges. They decide 500 cases annually, writing opinions in four-fifths of them. They have printed records. They decide the case before the opinion is written, a judge being designated to write the opinion of the Court. The Iowa court has six members. They first decide the case and assign it to a Judge to write the Court's opinion, as in Minnesota. They have the abstract system. They decide 550 cases annually. Pennsylvania, under like method to that in Minnesota, decides 500 cases annually, having seven judges. Others could be named. In each instance the judge writing the Court's opinion submits it to the further consideration of his associates. If it is approved, the opinion is ready for delivery.

Surely there is higher safety and better satisfaction in such method than in that we now pursue. And certainly our Judges should be able to dispose of as much work as our Brothers in other states.

Not the least advantage that would come from a departure from the present system would be that a Judge agreeing with the prevailing, majority view, and conclusion would write the opinion of the court.

The present system, with each Judge having his quota of assigned cases, anxious to keep up his corner in disposing of the business of the Court as assigned to him, has always, beginning long ago, made it practically impossible to do otherwise than is now being done. It is a serious defect. It is an immediate result of the emphasized individualizing of what should be court work, court responsibility.

In writing thus fully on this matter I trust I have not evinced an unjustified concern over what may, upon superficial consideration, appear to you to be of minor importance. My judgment, formed from actual observation and experience, is that no matter of judicial method approaches it in importance. But this is my view. I am anxious to have the benefit of your candid view. I have no personal interest in a change of method. If it were proper to consult my personal comfort in respect of such an important matter, I would probably find that the present system, exacting in labor as it is, would require less effort than one where duty would be to investigate each case.

With acknowledgments of the kindness, courtesy, and generous favor you have extended me in my service here, I am,

Gratefully yours,

THOMAS C. McCLELLAN.

SUGGESTIONS FOR REFORMING JUDICIAL ADMINISTRATION — CONSTITUTIONALITY OF LAW TO BE DETERMINED BEFORE ITS PASSAGE.

The issue of your Journal for July 12, 1912, containing the different articles upon the subject of the recall of judges and of decisions, was very interesting. The articles not only showed learning, but were, no doubt, based upon a desire to aid in the solution of all such questions now before the public and the members of the legal profession and being much discussed. It is the duty of the profession to assist in the solution of such questions. The agitation is deep-rooted, and will result in either greater unrest and dissatisfaction by the people towards the courts, or it will produce good results. Hence I think it is very commendable on your part to have extended to the profession an invitation, as you did in your issue of July 12, to express their views in your Journal for the purpose of assisting in the betterment of things in this direction.

Availing myself of your invitation, I make the following suggestions. It seems to me that our principal trouble is that our three departments of government are not properly coupled, for the purpose of bringing about practical results, that is, not only as to the machinery of government, but bringing about the necessary legislation in behalf of the people, passing such laws as they desire and the proper enforcement of them. Our Executives, Legislatures and Supreme Courts are too far apart for

practical, business purposes, in performing their respective functions and duties. No large business corporation, having three co-ordinate branches could succeed, unless those branches were also co-assistant towards one another. If they were antagonistic it would only be a question of time when they would all go asunder and the business engaged in would be ruined. Our three departments of government are not helpful enough towards one another. Then how can we remedy this?

First: Require all legislative bills to be filed with the Secretary of State a certain number of days before the meeting of each session of the legislature. Let each bill show who is its author, and the sources from which it emanates. Have the bills published and the author's names so that the public can be enlightened in reference to the prospective legislation, and discuss the same if they desire. Permit no other bills to be passed by the legislature at that session, except upon a two-third vote of each house. This would be the means of having publicity of all legislation, and preventing lobbying and logrolling efforts for improper legislation. It would also expedite matters and cut off much needless delays and foster economy.

Second: I would have a joint standing committee of the Senate and House of the Legislature, called the judicial or law committee. That it shall be the duty of this committee to meet together with the Supreme Court judges and pass upon the bills so filed with the Secretary of State, in reference to their constitutionality, a sufficient length of time before the meeting of the legislature. If there are any such objections to the bills, the judges shall indicate how they can be corrected, if the same can be done, and then the committee shall make the necessary changes; if such objections can't be corrected such bills to be killed by the committee. After the meeting with the judges, the committee are to meet with the governor and confer with him in reference to his approval or disapproval, obtaining from him any suggestions he may make. That there shall be a record of the proceedings of the committee kept and a report made of the same to the legislature. That no constitutional issue shall be raised in any litigation concerning any bill so passed upon by the Supreme Court judges. When the legislature would meet the principal questions before it would be the policy or wisdom of enacting such bills into laws. The question of their being against the constitution or not meeting the approval of the governor would have been settled. I would also have this committee to draw the general revenue bill and all administration bills, the same to be submitted to the judges as other bills and to be reported to the legislature in the same way.

Third: I would have the Supreme Court judges to be counselors to the governor and his administrative officers, giving their opinion, when requested, upon any question, whether upon the constitution or a statute, in reference to any of their duties to be performed.

In conclusion, the enactment of these matters would require constitutional amendments, but would not our State Supreme Courts become more useful, and really take more practical interest in the affairs of state? Would not the three departments of government be better coupled together for mutual aid and public benefit than at present? I shall be pleased to learn the views of others upon the matters and things suggested.

H. K. OLLIPHANT.

Bartow, Florida.

(Our correspondent's suggestions are not in all respects untried. Massachusetts has a system by which the legislature may require the Supreme Court to pass on the constitutionality of an act before its passage. We believe all the states will ultimately adopt the practice. We do not think it necessary that these questions be determined before the legislature meets, but they should be determined during the session of the legislature and opportunity should be given to parties whose interests may be adversely affected by such legislation to show by counsel why the proposed law is unconstitutional.—Ed.)

BOOKS RECEIVED.

Law of Banks and Banking by Francis B. Tiffany, author of Death by Wrongful Act and hand books on Sales and Principal and Agents. Hornbook Series, $3.75 per volume. St. Paul, Minn., West Pub. Co. Review will follow.

HUMOR OF THE LAW.

Warden—"The prisoner refuses to work unless he can practice his own trade?"

Governor—"That is but natural. Put him to it. What is his trade?"

Warden—"He is an aviator, sir."—Toledo Blade.

One dull day in a law office in a small Kansas town, the lawyer and his assistants were much surprised to see entering the door a man with a badly swollen face tied up with a big handkerchief. Before saying anything he sank wearily into a chair. Scenting an assault and battery case, and perhaps a damage suit, the lawyer briskly inquired what he could do for the weary one and the answer he received was:

"Say, is this the place where you pull teeth?"

"No," replied the lawyer. "We sometimes help people to cut their teeth, but we never pull them."

An aged man named Green, who had the reputation of being always ready to defend himself, was on trial for assault with intent to kill. The prosecution, in an attempt to impeach the accused, asked a witness:

"Are you acquainted with the reputation of Old Man Green for truth and veracity among his neighbors and acquaintances, in the vicinity where he lives, and among those who know him"

"Yes, sir, I am."

"Is that reputation good or bad?"

"Well, sir, his reputation for truth is good, but his veracity is very bad."

This remarkable answer upset the gravity of the court and spectators.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Aliens**—Chinese Woman.—A foreign-born Chinese woman, though married to a Chinaman of American birth, is an alien within Act Feb. 20, 1907, as amended by Act March 26, 1910, providing for deportation of aliens found in houses of prostitution.—Low Wah Suey v. Backus, 32 Sup. Ct. Rep. 734.

2. **Bankruptcy**—Attorney Fees.—Under Bankr. Act 1898, § 60d, a bankrupt may lawfully pay a reasonable fee to his attorney for services rendered in connection with his affairs, whether such payment is made before or after the services were rendered.—In re Cummins, U. S. D. C., 196 Fed. 224.

3.——Exemptions.—Under the federal bankruptcy act, the jurisdiction of the federal court over property of the bankrupt ceases when it determines that such property is exempt, and an adjudication of the bankruptcy court that a mortgage is invalid as an illegal preference, does not prevent the mortgagee from maintaining an action in a state court to foreclose the mortgage so far as the same affects exempt property; the bankruptcy court having expressly relinquished jurisdiction of the part of the property exempt.—Morris v. Covey, Ark., 148 S. W. 257.

4.——Foreign Stockholders.—The relation of foreign stockholders to a bankrupt corporation is such that the bankruptcy court has jurisdiction to determine whether their stock was fully paid, and therefore nonassessable.—In re Monarch Corporation, U. S. D. C., 196 Fed. 252.

5.——Liens.—The general lien of a landlord for rent, under Civ. Code Ga. 1895, is not created by judgment or obtained through legal proceedings within Bankruptcy Act, though levy was made within four months of filing of petition in bankruptcy.—Henderson v. Mayer, 32 Sup. Ct. Rep. 699.

6.——Supplementary Proceedings.—The bankruptcy court will not restrain supplementary proceedings under a judgment against a bankrupt not affected by a discharge, except in so far as such proceedings will interfere with the due administration of the estate of the bankrupt under the bankruptcy law.—In re Munro, U. S. D. C., 195 Fed. 817.

7.——Voidable Sale.—A fraudulent sale by a bankrupt after the filing of the petition in bankruptcy, made to one chargeable with knowledge of the fraudulent transaction, held voidable at the option of the trustee.—In re Denson, U. S. D. C., 195 Fed. 854.

8.. **Banks and Banking**—Actions.—In a suit against stockholders of an insolvent bank to recover statutory liability, it is not necessary that all the stockholders be included in the same judgment.—Toll v. Cobbey, Colo., 124 Pac. 357.

9.——Receivership.—Where a receiver of an insolvent bank has been appointed, the depositors cannot sue the directors for their negligent mismanagement, unless the receiver, on demand, has refused to institute the suit, and so a mere allegation that he declined to sue is insufficient.—Saunders v. Bank of Mecklenburg, Va., 75 S. E. 94.

10. **Bills and Notes**—Burden of Proof.—Usually where it is shown that plaintiff has acquired a negotiable instrument before maturity for value, the burden is on the maker to show that the plaintiff had notice of defenses.—Brannin v. Richardson, Tex., 148 S. W. 348.

11.——Illegal Consideration.—A lessee, whose note to his lessor was illegal because of a violation of law as to the sale of intoxicating liquors, who is compelled to pay the note to the lessor's bona fide transferee, cannot recover such amount as against his lessor.—Koepke v. Peper, Iowa, 136 N. W. 902.

12.——Parol Evidence.—It is no defense to an action on a note, the consideration of which, though not expressed, was the right to sell a patented clothesline, that the wire purchased to make the line rusted, and the seller orally guaranteed that such wire would not rust.—Hunt v. McKinney, Ga., 75 S. E. 144.

13.——Pleading.—Where a declaration alleged that a note was given pursuant to an agreement, a plea setting forth a different agreement, and showing that, according to its terms, the consideration had failed, was good.—Belcher v. Dickinson, W. Va., 75 S. E. 78.

14.——Presumptions.—In the absence of agreement to the contrary, the parties to a note are presumed to have contracted liability according to the legal effect of the instrument.—Canney v. Corey, Me., 83 Atl. 662.

15.——Transfer of Title.—An indorsement on the back of a non-negotiable note, guaranteeing its payment at maturity or at any time thereafter, with interest until paid, waiving demand, notice of nonpayment, and protest, as collateral, signed by the payee, is sufficient to pass title.—McNary v. Farmers' Nat. Bank, Okla., 124 Pac. 286.

16. **Carriers of Goods**—Initial Carrier.—Where a car load of fruit trees was routed over several connecting lines under a contract of shipment, the initial carrier is liable to the shipper for loss of the freight on its being diverted by a second carrier from the route specified; the initial carrier having participated in such diversion.—Drake v. Nashville, C. & St. L. R. Co., Tenn., 148 S. W. 214.

17.——Spur Tracks.—A railroad company owes to establishments connected with its line by spur track the same duty to furnish shipping facilities as it does to persons whose shipments are situated immediately on its main road.—Louisville & N. R. Co. v. Higdon, Ky., 148 S. W. 26.

18. **Carriers of Live Stock**—Burden of Proof.—An action in tort against a carrier for injuries to live stock is sustained by proof that the stock was delivered to the carrier in good condition, and that when received at the point of destination, the stock was in bad condition, not apparently due to inherent vices.—Gilbert Bros. v. Chicago, R. I. & P. Ry. Co., Iowa, 136 N. W. 911.

19. **Carriers of Passengers**—Expulsion of Passenger.—Where a passenger does not request additional time to search for his ticket which he has mislaid, the conductor may expel him at once, without giving him additional time.—Louisville & N. R. Co. v. Mason, Ala., 58 So. 963.

20.——Expulsion of Passenger.—A sleeping car company is liable for expulsion of a passenger, due to selling him a sleeping car ticket over a route between two points other than that called for by his railroad ticket, where the ticket was in the possession of the sleeping car company's agent and subject to inspection.—Nashville, C. & St. L. Ry. Co. v. Price, Tenn., 148 S. W. 219.

21.——Ordinance.—An ordinance requiring a street railway company to furnish transfers to enable passengers to go by reasonably direct routes does not deprive the company as a carrier from making reasonable rules.—Duke v. Metropolitan St. Ry. Co., Mo., 148 S. W. 166.

22. **Chattel Mortgages**—Future Crops.—A mortgage of a crop to be grown the following year does not create a lien, where the mortgagor was in possession under a rental contract with the owner, a third person, only for the year in which the mortgage was given, without any arrangement or understanding with him as to the following year.—Young v. Hall, Ala., 58 So. 789.

23. **Commerce**—Alcoholic Liquors.—Where alcoholic liquors, imported from a foreign country, were stored in New York, their transmission to New Orleans was a transportation within the Wilson Act of Congress of August 8, 1890, and not an importation, though the storing in New York was only temporary and the liquors were originally intended for New Orleans.—State v. Frederick De Bary & Co., La., 58 So. 892.

24.——Food and Drugs Act.—Congress did not by passage of the Food and Drugs Act June 30, 1906, for the prevention of adulteration and misbranding of foods and drugs when the subject of interstate commerce, prohibit the enactment of Acts Ind. 1907, c. 206, relating to sales of foodstuffs in original packages.—Savage v. Jones, 32 Sup. Ct. Rep. 715.

25.——Intoxicating Liquors. — Intoxicating liquors lawfully sold in good faith in one state may be lawfully delivered to the purchaser in another state, and the carrier and means employed in such carriage are entitled to protection from interference by the same authorities as instruments of interstate commerce.—Kansas City Breweries Co. v. Trickett, U. S. D. C., 195 Fed. 840.

26. **Contracts**—Construction.—Courts may generally adopt with safety the practical interpretation of a contract by the parties while they are engaged in its performance.—Guaranty Trust Co. of New York v. Koehler, C. C. A., 195 Fed. 669.

27.——Illegality.—An entire claim, under a contract for services, is invalidated by continuing in the service after acquiring knowledge of its unlawful character, though a large part of the service was performed innocently.—Small v. Lowrey, Mo., 148 S. W. 132.

28.——Practical Construction.—Where a well driller continued to drill after finding a small amount of water, he thereby conclusively showed that he understood the contract obligation to find water to mean water in appreciable quantities.—Turner v. Hartsell, Ala., 58 So. 950.

29.——Waiver of Performance.—Where one engaged to do plastering in a building did not do it in a workmanlike manner, as required by the contract, the owner's occupation of the building by his tenants was not a waiver of his right to recover for the breach.—Walter v. Huggins, Mo., 148 S. W. 148.

30. **Conversion**—Equitable.—A will, which directs the executor to sell real estate described and to give specified parts to beneficiaries named, equitably converts the real estate into personalty, and the gift must be deemed one of personalty.—Weed v. Hoge, Conn., 83 Atl. 636.

31. **Corporations**—Confidential Relations.—A rigid scrutiny will be made into all transactions between a stockholder and a corporation in the interest of creditors to ascertain whether the transactions have been in good faith.—In re McCarthy Portable Elevator Co., U. S. D. C., 196 Fed. 247.

32.——Confidential Relations.—Corporate officers holding positions of trust should be held to strict accountability, and the law must be so administered that they will never be allowed to profit by disobeying it.—Shearer v. Barnes, Minn., 136 N. W. 861.

33.——Insolvency.—The maxim, "Equality is equity," is generally applicable on distribution of an insolvent corporation's assets.—Nichols v. Waukesha Canning Co., U. S. D. C., 195 Fed. 807.

34. **Courts**—Jurisdiction.—Jurisdiction of the subject-matter has reference, not only to the cause of action and relief sought, but judicial power of the court referable to its organic act and other laws.—Cowie v. Strohmeyer, Wis., 136 N. W. 956.

35.——Law of the Case.—A prior decision of a Circuit Court of Appeals is not the law of the case for the Supreme Court, reviewing a later decision of the former court in the same case.—Messinger v. Anderson, 32 Sup. Ct. Rep. 739.

36. **Criminal Evidence**—Appeal and Error.—In the absence of an avowal as to what testi-

mony excluded on objection would have been, if admitted, its exclusion was not reviewable.—Robinson v. Commonwealth, Ky., 148 S. W. 45.

37.——Instructions.—It is only where a case is solely dependent on circumstantial evidence that an instruction as to such evidence is required; and where there is both circumstantial and direct evidence, the omission of such a charge is not error.—Hegwood v. State, Ga., 75 S. E. 138.

38. **Criminal Law**—Impeaching Verdict.—A juror cannot be heard to impeach his verdict, and remarks of a juror made subsequent to the trial cannot be testified to by strangers.—State v. Cloud, La., 58 So. 827.

39. **Damages**—Fright.—Where plaintiff suffered a substantial physical injury from the fright or shock occasioned by defendant's wrongful conduct, she may recover, though she suffered no other physical injury.—Spearman v. McCrary, Ala., 58 So. 927.

40.——Punitive Damages.—Negligence alone, however gross, does not justify punitive damages; but there must be an element of willfulness and of conscious indifference to consequences from which malice might be inferred.—St. Louis Southwestern Ry. Co. v. Evens, Ark., 148 S. W. 264.

41.——Profits.—Profits to be recoverable as damages for breach of contract must be within the contemplation of the parties at the making of the contract.—Harmon v. Frye, Ark., 148 S. W. 269.

42. **Dedication**—Intent.—The intention of the owner to devote his property to public use is a necessary ingredient of a valid dedication.—Garvin County v. Lindsay Bridge Co., Okla., 124 Pac. 324.

43.——Parol.—An express dedication to a municipality of a particularly described parcel of land for use as a public street may be made by parol.—Ellis v. City of Hazelhurst, Ga., 75 S. E. 99.

44. **Deeds**—Recital of Consideration.—The amount recited in a deed as the consideration for the conveyance is presumptively the consideration paid, in the absence of rebutting evidence.—Kinsell v. Thomas, Cal., 124 Pac. 220.

45. **Depositaries**—Action.—A depositor may not recover his general deposit of his creditor after his debt in excess of his deposit has become due, unless he first pays his debt.—Guaranty Trust Co. of New York v. Koehler, C. C. A., 195 Fed. 669.

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47. **Divorce**—Decree Pro Confesso.—In a suit for divorce, even if defendant fails to appear, the courts must proceed with the same formality as if he were present, maintaining the keenest opposition, and the entry of a decree pro confesso amounts to but little.—State v. Wolfe, Fla., 58 So. 841.

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49. **Estoppel**—Bills and Notes.—Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name she would become merely a surety for him, is estopped to deny that he assumed the relation of principal to plaintiff.—Canney v. Corey, Me., 83 Atl. 662.

50.——Mortgagee.—Where defendant was induced to loan money and accept a chattel mortgage to secure the same on the faith of plaintiff's representation that it had no claim on the property, plaintiff was estopped to thereafter assert a prior mortgage thereon.—Winter-Loeb Grocery Co. v. Mutual Warehouse Co., Ala., 58 So. 807.

51. **Evidence**—Judicial Notice.—In the trial of one case, the court cannot take judicial notice of the record of another case even in the same court, without its formal introduction in evidence.—O'Connor v. United States, Ga., 75 S. E. 110.

52.——Telephone Conversation.—Refusal to strike testimony of witness as to telephone conversation with a party held proper where, in his testimony he admitted having the conversation, although the witness' daughter, and not the witness did the talking.—Pieper v. Krutzfeldt, Iowa, 136 N. W. 904.

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54. **Executors and Administrators**—Good Faith.—If an executor acts reasonably and in good faith in the disbursement of money pursuant to an order of the supervising court within its jurisdiction, he is protected from personal liability.—Cowie v. Strohmeyer, Wis., 136 N. W. 956.

55.——Sales.—Though proceeds of a sale of realty were used to pay a mortgage debt, which had not been probated, the order of sale was not without jurisdiction, where there were other debts which had been probated.—Long v. Hoffman, Ark., 148 S. W. 245.

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57. **Fraud**—Estoppel.—Party's negligence in failing to read instrument held not to prevent false representations as to its contents from avoiding the instrument, where from pain and suffering or other circumstances the deceived party was incapable of judging of the necessary precautions to be taken against being defrauded.—Porter v. United Rys. Co. of St. Louis, Mo., 148 S. W. 162.

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60.——Original Agreement.—When the main object of guarantors is not to answer for the debt, default, or miscarriage of another, but to obtain benefits for themselves, their guaranty is an original agreement, and no writing is necessary under the statute of frauds.—Guaranty Trust Co. of New York v. Koehler, C. C. A., 195 Fed. 669.

61.——Part Performance.—Where a vendee under an oral contract to convey land went into possession, made valuable improvements, and paid the purchase price, the contract was not within the statute of frauds.—Cantwell v. Barker, Ore., 124 Pac. 264.

62.——Practice.—Where, in an action for a physician's services, defendant pleaded the statute of frauds, claiming that his agreement was to answer for the debt of another, but plaintiff's evidence showed an original employment, while defendant's evidence was that he did not agree to be bound for such services, either on his own behalf or for another it was error to refuse to withdraw the plea on the statute of frauds from the jury.—Williamson v. Green, Ala., 58 So. 974.

63. **Gifts**—Equity.—A parol gift of land, accompanied by possession by the donee and acts by him to carry out the purpose of the gift, is enforceable in equity.—Kinsell v. Thomas, Cal., 124 Pac. 220.

64. **Habeas Corpus**—Custody of Child.—Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman, who cares for it in a suitable home, and a mutual attachment grows up between them for a number of years under a contract with him, awarding to her its permanent custody, in habeas corpus to regain the child, the controlling consideration is the child's best interests.—Ex parte Burdick, Neb., 136 N. W. 988.

65.——Remedy.—Whether an offense is sufficiently alleged in indictment is not a proper subject-matter for inquiry on habeas corpus.—Ex parte Webb, 32 Sup. Ct. Rep. 769.

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67.——Mortgage.—A mortgage of a debtor's homestead without the written consent of the wife, though in form of a sale and resale of the premises, is a nullity between the parties and the holder of a note for the price.—Crain v. Bank of Osyka, La., 58 So. 824.

68. **Husband and Wife**—Divorce.—Where a husband furnished his wife a room in premises occupied by his mother, who rented rooms, the refusal of the wife to return thereto as a matrimonial domicile held not ground for separation for abandonment, when he was able to furnish a better home, and his mother was hostile to the wife.—Geisinger v. Conners, La., 58 So. 815.

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70. **Indictment and Information**—Counts.—Where an indictment for obtaining money under false pretense charged a commission of the offense in three ways, each way in a separate count, held, that it charged but one offense, and the commonwealth could not be required to elect.—Saylor v. Commonwealth, Ky., 148 S. W. 6.

71. **Infants**—Agents of.—A minor cannot authorize any one to act as his agent or acquiesce in or ratify the acts so as to make them his own.—Weidenhammer v. McAdams, Ind., 98 N. E. 883.

72.——Estoppel.—In the absence of bad faith, neither the doctrine of estoppel nor that of waiver applies to minors.—Cowie v. Strohmeyer, Wis., 136 N. W. 956.

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75.——Evidence.—In an action on an insurance premium note, defended on the ground that defendant did not receive the policy applied for, the application was admissible to contradict such defense.—Thurman v. Farmers' Mut. Fire Ins. Co., Miss., 58 So. 777.

76.——Proximate Cause.—Where a man is so afflicted that he will die from such affliction within a short time, yet if, by some accidental means, his death is caused sooner, it will be a death from accident, within the meaning of the terms of an accident insurance policy.—Hooper v. Standard Life & Accident Ins. Co., Mo., 148 S. W. 116.

77.——Waiver.—Where a policy of insurance contains conditions that it should be void on a change of title, and that no agent shall have the power to waive any conditions, unless the waiver be indorsed on the policy, plaintiff is bound by such conditions; and his petition, setting up a verbal agreement with the agent in contravention of the same, is properly dismissed.—People's Bank of Donaldsonville v. National Fire Ins. Co. of Hartford, Conn., La., 58 So. 826.

78.——Waiver.—A stipulation in a hail policy that insured shall within 60 days after loss make proof of same to the insurance company is waived where the insurer received and retained insufficient proof without specific objection to any defects therein.—St. Paul Fire & Marine Ins. Co. v. Griffin, Okla., 124 Pac. 300.

79.——Waiver.—Though, when a house was burned, the policy was suspended under a by-law, because the house had been vacant 10 days, and notice of reoccupation had not then been given, the company not having, by affirmative action, avoided the policy, but retained the unearned premium, recovery could be had on it.—Brashears v. Perry County Farmers' Protective Ins. Co., Ind., 98 N. E. 889.

80. **Landlord and Tenant**—Estoppel.—Where a member of a firm in possession of land under a lease acquired title adverse to the lessor, he cannot bring ejectment in the name of the grantor for his benefit without surrendering possession to the lessor.—Jones v. Allen, Fla., 58 So. 784.

81.——Partial Eviction.—Where a lessee by reason of the lessor's failure to keep the premises in a tenantable condition abandons the first story, but not the other two stories of the building, she is entitled to a pro rata abatement of the rent.—Dolph v. Barry, Mo., 148 S. W. 196.

82. **Larceny**—Possession of Stolen Property.—The jury can infer guilt from the possession of recently stolen property, in the absence of satisfactory explanation by accused.—Mosley v. State, Ga., 75 S. E. 144.

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86. **Malicious Prosecution**—Burden of Proof.—The burden was on plaintiff in a malicious prosecution case to prove that defendant's agent in causing plaintiff's arrest was acting under the authority and directions of defendant or within the scope of his duties as defendant's employee.—Birmingham Ry., Light & Power Co. v. Ellis, Ala., 58 So. 796.

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90. **Mortgages**—Condition Broken.—A mortgagee, who, after condition broken, but before

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91.——Estoppel.—Where the makers of a mortgage note falsely represent the incumbrances upon the land sold by them, and induce the purchaser to assume the payment of the note as part of the consideration, he may have appropriate equitable relief, in an action by the holder of a note against him and the makers.—Britton v. J. W. Crowdus Drug Co., Tex., 148 S. W. 350.

92.——Failure of Consideration.—A mortgage ceases to be enforceable on failure of consideration.—King Lumber Co. v. Spragner, Ala., 58 So. 920.

93.——Payment.—Payment is an affirmative defense, and the burden of proving and pleading the same is on the defendant.—Redmond v. Hughes, 135 N. Y. Supp. 843.

94. **Municipal Corporations**—Police Power.—The police power of a state justifies a municipal ordinance prohibiting the keeping of billiard or pool rooms for hire.—Murphy v. People of State of California, 32 Sup. Ct. Rep. 697.

95. **Names**—Suffixes.—The suffixes "Jr." and "Sr." are no part of a man's name, and may be disregarded.—Ross v. Berry, N. M., 124 Pac. 342.

96. **Navigable Waters**—Meanders.—Under a patent from the United States, the title to bed of lakes not within the meandered lines, and not surveyed or described in the plat as land, but as lake, passed as riparian rights to the adjoining owners.—Glasscock v. National Box Co., Ark., 148 S. W. 248.

97. **Negligence**—Last Chance.—Where the evidence shows a clear case of "last chance" negligence, such negligence will be considered as the sole producing cause of the injury sued for.—Flynn v. Metropolitan St. Ry. Co., Mo., 148 S. W. 122.

98.——Last Chance.—The rule of last clear chance implies that the person charged knew that the person injured was in danger and negligently failed to avoid injuring him; but his testimony that he did not know is not conclusive.—Zitnik v. Union Pac. R. Co., Neb., 136 N. W. 995.

99.——Contributory Negligence.—One whose injury or death is occasioned by negligence of his own which in any degree proximately contributed thereto cannot recover in the national courts from another whose negligence also contributed or was the primary cause.—Hart v. Northern Pac. Ry. Co., C. C. A., 196 Fed. 180.

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101. **Principal and Agent**—Agency.—A principal is liable on a separable part of a contract which he authorized his agent to make, though the latter undertook to further bind him in excess of his authority.—Guaranty Trust Co. of New York v. Koehler, C. C. A., 195 Fed. 669.

102. **Principal and Surety**—Release of Surety.—Where the owner requests a building contractor to quit the work, and demands and receives a surrender of the contract long before the time for completing the work expires, without any excuse for such demand, he cannot recover against a surety on the contractor's bond.—Hubbard v. Reilly, Ind., 98 N. E. 886.

103. **Rewards**—Revocation.—The offer of a reward can only be revoked in the manner in which it was made, or in some other manner that will give the revocation the same publicity as the offer.—Sullivan v. Phillips, Ind., 98 N. E. 868.

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105. **Telegraphs and Telephones**—Franchise.—A municipality, in selling a telephone franchise, may attach conditions for the benefit of its inhabitants; and a condition that the company should install no party lines is valid, and is a part of the contract which may be enforced by the city.—City of Louisville v. Louisville Home Telephone Co., Ky., 148 S. W. 13.

106.——Free Delivery.—A plea in an action against a telegraph company for failing to deliver a message that the addressee lived beyond the free delivery limits, but failing to allege demand for and nonpayment or guaranty of extra charge for delivery, held insufficient.—Western Union Telegraph Co. v. Harris, Tex., 148 S. W. 284.

107.——Rates.—Enforcement of municipal ordinance fixing telephone rates should not be enjoined as confiscatory before giving the ordinance a trial to show its actual effect.—City of Louisville v. Cumberland Telephone & Telegraph Co., 32 Sup. Ct. Rep. 741.

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110. **Trusts**—Resignation of Trustee.—As a general rule, a trustee may relieve himself from the liabilities arising from a trust relation by submitting the administration of the trust to the jurisdiction of the court.—In re Nixon's Estate, Pa., 83 Atl. 687.

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112. **Vendor and Purchaser**—Marketable Title.—A vendee, though entitled to a marketable title, is not entitled to demand a title absolutely free from all suspicion or possible defect.—Kling v. A. H. Greef Realty Co., Mo., 148 S. W. 203.

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116.——Construction.—A provision in a will expressing the desire that the present crop be appropriated to the payment of a debt due a named creditor, and balance to other creditors, is not a legacy to the named creditor, but simply an expression of desire that his debt be first extinguished from the specific fund.—Thompson v. Stephens, Ga., 75 S. E. 136.

117.——Construction.—In the absence of anything in the will indicating the contrary, "descendants," in a gift of the remainder to children reared by testator, to be divided equally between them and their descendants, does not have other than its ordinary meaning, so as to include brothers and sisters of one of them dying without issue.—Romjue v. Randolph, Mo., 148 S. W. 185.

118.——Specific Legacy.—A "specific legacy" is a gift of particular specified things, or of the proceeds of the sale of specified things, or of a specific fund or a defined portion thereof, and it is satisfied by the delivery of the specific property identified as the subject of the gift, and where the same is not owned by testator at his death the legatee takes nothing, for he has no claim on the general assets.—Weed v. Hoge, Conn., 83 Atl. 636.

119. **Work and Labor**—Conferring Benefit.—Rendition of services merely is insufficient to carry a right to compensation if the services were not requested, unless a benefit has been conferred on the defendant.—In re McCarthy Portable Elevator Co., U. S. D. C., 196 Fed. 247.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER
Published by

Central Law Journal Company

420 MARKET STREET, ST. LOUIS, MO.
To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post-Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF
ALEXANDER H. ROBBINS, MANAGING EDITOR

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Central Law Journal.

THE BEST FORM BOOK ON INTEREST PLEADINGS

VOL. 75 ST. LOUIS, MO., OCTOBER 18, 1912. No. 16

Central Law Journal.

ST. LOUIS, MO., OCTOBER 18, 1912.

VALIDITY OF CONTRACT BETWEEN TWO PARTIES RESTRICTING THE RIGHT OF ONE OF THEM TO SETTLE A CONTROVERSY WITH A THIRD PERSON.

It has been objected in a number of cases that an attorney's lien statute, providing that, if an action is brought, or a claim is held for collection, by an attorney, he may notify the adversary party, that he claims a certain portion of the proceeds paid in settlement for his fee, which claim must be taken into account by such party, is unconstitutional. The Supreme Court of Illinois has lately sustained the constitutionality of such a statute in Standidge v. Chicago Rys. Co., 98 N. E. 963.

This court refers to decision by Missouri Supreme Court and by New York Court of Appeals, in support of its ruling, citing O'Connor v. St. Louis Transit Co., 198 Mo. 641, 97 S. W. 150, 115 Am. St. Rep. 495 and Fischer Hansen v. Brooklyn Heights Railroad Co., 173 N. Y. 492, 66 N. E. 95.

The Missouri court does not devote a great deal of consideration to the point, but contents itself with saying that the act did not restrict or destroy any right of the defendant to contract. It simply created a lien upon the cause of action in favor of the attorney at law which the defendant in dealing with the attorney's client was bound to respect. The court seems to consider only the adversary's position in the direct, and not the incidental, effect thereon arising out of the client's giving such a lien. The Illinois case treats the matter from the same standpoint, saying it does not deprive defendants of the right to buy their peace by making contracts of settlement.

But may it be said, that this right is not very materially interfered with, in that defendant by reason of a contract, which does not amount to the transfer of property—a chose in action—and notice thereof, yet cannot complete a setlement with his debtor without subjecting himself to a penalty in behalf of another?

The New York case goes into this matter very much more at length, viewing the situation of the attorney's client, where a statute created "a lien in favor of the attorney on his client's cause, in whatever form it may assume in the course of the litigation, and enables him to follow the proceeds into the hands of third parties without regard to any settlement before or after judgment," as was said in a prior New York decision.

That decision also said: "It is urged by the defendant's counsel that this construction of the section was against public policy, as the law favors settlements." It was said: "This criticism overlooks the fact that the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement. The *client* is still competent to decide whether he will continue the litigation or agree with his adversary."

The New York court, in the Fischer-Hansen case, *supra*, said such a statute was remedial and to be construed liberally, and the court declares that the legislature did not intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action, nor to overturn the ancient and honored rule of law that settlements are to be encouraged, by giving an attorney power to insist that the litigation should continue until he consents that it should stop.

It is thus seen, by every fair inference, that a statute could not create validity for any contract, whereby one may bargain away his right to settle a claim which belongs to him and we perceive that the New York court allowed the objection to be made by the adversary and not by the client. It thereby admitted that, were the contract between the client and the attorney opposed to public policy, the latter could claim no advantage thereunder against his client's adversary. *Ex turpi causa, non oritur actio.*

How, then, may it be claimed that such contracts as are made by employers and

others with indemnity companies, whereby a debtor is forbidden to buy his peace, are valid? The company cannot absolve the employer from any obligation he is under, but it does prevent all settlements not made by its consent. If it is against an ancient and honored rule of law that settlements are to be encouraged, it is a contract against public policy.

The New York court thought that an attorney having the power to prevent a client from settling his own case without his consent, was opposed to this rule. Is an agreement by one that his hands shall be tied by another than his attorney any the less opposed to this rule?

Take, for example, a claim arising out of contract. There is something in the way of *delectus personarum*. When two persons contract A may not be willing to trade with B on as favorable terms as he would with C. And after C has become indebted to him in the course of contract, he might not be willing that B should be substituted in C's place in negotiations for the settlement of his claim against C, especially if B agrees with C to be substituted as the debtor. Could C impose B on A, when B merely would be looking after his own interests? It would seem clear he could not.

Is there any difference between liability on contract and in tort? And is the right of one against whom there is a claim to buy his peace more sacred than that of a claimant to effect an honest settlement? Is not one position the necessary corollary of the other? No one may read the cases we have cited without concluding that the hands neither of the claimant nor his adversary must be tied. Indeed, how may any settlement be reached between any two parties, if by contract either has lost his capacity further to contract?

There seems another reason arising out of the statute of frauds for invalidating contracts of the kind we have been discussing. Such an one as the indemnity company cannot in an oral way enter responsibly into negotiations for a settlement or agree with a claimant upon a binding oral compromise, whether part payment be made or not. But its tentative efforts easily may become a source of embarrassment and prejudice to that claimant.

Lastly it is to be said that public policy by statutory rule declares the conditions of contractual incapacity and, presumptively, no individual or individuals in agreement are allowed to invade what is legislative domain.

NOTES OF IMPORTANT DECISIONS.

INTOXICATING LIQUORS — RECOVERY FOR LIQUOR SHIPPED TO CONSIGNEE WITHOUT ITS BEING PREVIOUSLY ORDERED.—The facts in the case of Small Grain Distilling Co. v. Davis, 74 S. E. 897, decided by Georgia Court of Appeals, show that a dealer shipped, of his own motion and without previous order therefor, whisky to defendant living in Georgia. The latter supposing the liquor was a gift took it from the express office. He later received a letter from the dealer proposing to sell the liquor. Defendant refused to buy or pay for the whisky. He wrote saying he had used part of the shipment in making presents to his friends and asked them to advise disposition of what remained. The dealer asked a return of the goods at his expense which he declined to do. The dealer sued and the action was defended on the ground that there was an unlawful sale in Georgia.

Plaintiff insisted that the shipment was protected by the interstate commerce clause and the court distinguished Rose v. State, 133 Ga. 353, 65 S. E. 770, relied on, where orders were solicited by circular. It was said that no order having been given in this case, no implied assumpsit to pay arose out of defendant's keeping and refusing to pay for the whisky.

The opinion said: "The whole conduct of the Distilling Company clearly shows not a contract of sale, but a mere offer to sell which was never accepted by Davis. The title to the whisky never got out of the Distilling Company. In fact no sale was consummated. If Davis had paid for the whisky it would have been consummated. * * * Plaintiff can recover only on the theory that the sale was made to Davis. * * * If keeping the whisky and using it, after having been notified that it was not a gift, but was intended as a sale, raised an implied assumpsit on the part of Davis to pay for the whisky, the contract was completed in

Georgia. * * * The Distilling Company knew that it was a violation of law to sell whisky in the state of Georgia, and, in thus endeavoring to evade the law of this state, the loss of both the whisky and the value thereof was only what it justly deserved."

All of this may be true, but upon what principle may a court declare a forfeiture for an unsuccessful attempt to violate a law? It says no sale was consummated—no title passed and yet that the consumption or use of an owner's property by another raises no duty to account for its value. Was not the attempt to sell merely a collateral matter—merely evidence to show how defendant came into possession of another's property, innocently, at first, supposing he had title thereto?

The insistence by plaintiff's counsel, that this was an interstate transaction was rightly untenable, so far as the question of sale was concerned. Beyond that it had no relevancy, as if there was no sale and no title passed, plaintiff ought to have been allowed to recover for the property's destruction or passing beyond defendant's control, except as this may have been brought about by plaintiff's fault.

It seems to us the Georgia court is rather legislating in this case than deciding a question of law.

MONOPOLIES — STATE LEGISLATION FORBIDDING SALES FOR THE PURPOSE OF DESTROYING COMPETITION.—The Justices of the Supreme Judicial Court of Massachusetts, at the request of the governor of the state, gave their opinion of the constitutionality of a proposed statute "to prohibit discrimination in the sale of commodities." In re Opinion of the Justices, 99 N. E. 294.

The act aimed at three things, one to prohibit any person engaged in general business in the commonwealth from maliciously discriminating in prices of commodities sold in different parts of the commonwealth or to different purchasers; another prohibiting discrimination in prices for the purpose of destroying the business of a competitor and of creating a monopoly, and another to prohibit combinations for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly.

The constitutionality of the proposed law is sustained as to the first two purposes on the theory that: "There is no constitutional objection to a statute which prohibits an act done for the express purpose of annoying or injuring another and with actual malevolence, although the same act done with an innocent intent is lawful."

This cuts into the general principle that where an act lawfully may be done the intent with which it is done cannot be inquired into and asserts that the principle is within statutory control, under, no doubt, the police power.

The third purpose rests on the power of the legislature to prohibit contracts which are designed and have a tendency to create a monopoly. The justices say: "Although the statute is in some respects a limitation upon freedom of contract, yet we are of opinion that it does not go beyond the police power of the legislature," and reference, of course, is made to U. S. Supreme Court decision, though that might not be controlling, except as regards the Federal constitution.

Interstate commerce is said to be only incidentally affected by the statute and police power, therefore, is not forbidden its scope.

While such a statute may be constitutional, proof to show its violation often may be difficult to obtain, as, to show unlawful intent in the doing of an act otherwise lawful makes the doctrine of reasonable doubt a very formidable obstacle to conviction.

WAIVER OF BREACH OF CONDITIONS IN INSURANCE POLICY BY DEMANDING PROOFS AND ADJUSTING LOSS.

I. *Introductory: Scope of Article.*—Whether because of the fact that our courts are amenable to the universal sympathy for the under-dog, or because of the law's confessed aversion to forfeitures, certain it is that they have built up a theory of waiver and estoppel in the law of insurance, such that if the balm were put up in bottles and offered to that class of our population known as "the insured," even *Collier's* could not deny that a label bearing the statement "Guaranteed to cure all ills" were allowable. Of the exigencies, various and sundry, which call for its application, we are here concerned with but one: where, after a loss has occurred, and before settlement thereof, the company or its adjuster learns of the breach of some condition which would avoid the policy, but proceeds, notwithstanding to investigate and adjust the loss.

II. *History and Statement of Rule.*—In 1874, in what appears to be the first case in which exactly this state of facts was presented, the Supreme Court of Wisconsin[1] held that by demanding and causing the insured to produce, at considerable trouble to himself, proofs of loss, after it had learned that the policy was voidable because of a breach of the clause against additional insurance, the company waived such forfeiture and was estopped from relying upon it as a defense to a suit on the policy. In the opinion of the court, Lyon, J., said: "The defendant had an election between two courses of action, each entirely inconsistent with the other. It could have declared the policy void because of the additional insurance effected without its consent, or it could treat the policy as valid, and pursuant to stipulations therein, could require the plaintiff to furnish * * * plans and specifications of the building destroyed. With full knowledge of all the facts, it chose the latter course; and the plaintiff, at great expense to herself, complied with the requirement. This was a most decisive act on the part of the defendant—an act utterly inconsistent with an election to consider the policy void for a breach of any of the conditions thereof; and it seems very clear to us that the defendant is thereby estopped from insisting on a forfeiture of the policy."

Upon the authority of this case, and several others more or less analogous, the New York Court of Appeals[2] formulated this rule: "It may be stated broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, the company recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some expense, the forfeiture as a matter of law is waived, * * * and such a waiver need not be based upon any new agreement or on an estoppel." This rule, stated somewhat more accurately by the Supreme Court of North Carolina,[3] as follows: "If, after a breach of the conditions of a policy, the insurers, with a knowledge of the facts constituting it, by their conduct lead the insured to believe that they will still recognize the validity of the policy, and induce him under such impression to incur expense and trouble, they will be deemed to have waived the forfeiture, and will be estopped from setting it up as a defense," is now well established.[4]

III. *Rationale of the Rule.*—There has been considerable discussion as to whether the rule is founded upon waiver or upon estoppel, but it appears that, in fact, the doctrine is anomalous, being neither strictly waiver nor estoppel, but, rather, a sort

(1) Webster v. Phoenix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479.

(2) Titus v. Glens Falls Ins. Co., 81 N. Y. 410.

(3) Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

(4) German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W. 672; Hartford Fire Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393; Silverberg v. Phoenix Ins. Co., 67 Cal. 36, 7 Pac. 38; Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89; Scottish, etc., Ins. v. Colvar, 135 Ga. 188, 68 S. E. 1097; Farmers, etc., Ins. Co. v. Chestnutt, 50 Ill. 111, 99 Am. Dec. 492; Replogle v. American Ins. Co., 132 Ind. 360, 31 N. E. 947; Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774; Brown v. State Ins. Co., 74 Iowa, 428, 38 N. W. 135, 7 Am. St. Rep. 495; Corson v. Anchor Mut. Fire Ins. Co., 113 Iowa 641, 85 N. W. 806; Henderson v. Standard F. Ins. Co., 143 Iowa 572, 121 N. W. 714; British-American Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; Granger v. Manchester F. Ins. Co., 119 Mich. 177, 77 N. W. 693; Carpenter v. Continental Ins. Co., 62 Mich. 140, 28 N. W. 749; Marthinson v. North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291; Parsons v. Knoxville F. Ins. Co., 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; Bowen v. Hanover F. Ins. Co., 69 Mo. App. 272; McCollum v. Niagara F. Ins. Co., 61 Mo. App. 352; Home F. Ins. Co. v. Phelps, 51 Neb. 623, 71 N. W. 303; Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Walker v. Phoenix Ins. Co., 120 N. Y. 564, 29 N. E. 992; Armstrong v. Ins. Co., 156 N. Y. 633, 51 N. E. 392; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; McFarland v. Kittaning Ins. Co., 134 Pa. St. 590, 19 Atl. 766, 19 Am. St. Rep. 723; Niagara F. Ins. Co. v. Miller, 120 Pa. St. 504, 14 Atl. 385; German, etc., Ins. Co. v. Evants, 25 Tex. Civ. App. 300, 61 S. W. 536; Roberts v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Georgia Ins. Co. v. Goode, 95 Va. 751, 30 So. 366; Jerdee v. Cottage Grove Ins. Co., 75 Wis. 345, 44 N. W. 636; Oskosh Gas Co. v. Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; Cannon v. Home Ins. Co., 53 Wis. 585, 11 N. W. 11.

of hybrid, which is termed either waiver or estoppel indiscriminately. Though we find statements in the cases that, since forfeitures are not favored, a waiver of a forfeiture may be sustained by circumstances which do not present the strong equities required to create an estoppel;[5] that the test is whether the conduct of the insurer was, under the circumstances, consistent with the intention to insist upon the forfeiture;[6] and that any conduct by the insurer reasonably warranting the belief in the insured that the insurer had intentionally relinquished its right to insist upon a forfeiture will constitute a waiver,[7] we must remember that at least some of the elements of estoppel must be present—that is, the insured must have been put to some trouble and expense in the reasonable belief that the forfeiture had been waived, or in some other way be put in such a position that it would not be fair to him for the company to insist upon the forfeiture. It is believed that there is not a single case where a mere waiver unaccompanied by any of the elements of estoppel was held to be enough. The insured must have gone to some trouble or expense in reliance upon the waiver, or in some way have placed himself in a position such that for the company afterwards to insist upon the forfeiture would be unconscionable.

IV. *Application of Rule.*—(a) Rule Applicable.—The rule is applicable to any kind of insurance, whether property insurance,[8] life insurance[9] or fidelity insurance.[10] Any of the conditions of the policy may be waived in this way. Thus, if after the loss the adjuster learns that the insured had procured other insurance on the property, but, instead of denying liability for that reason, proceeds to investigate the loss, negotiates with the insured in an effort to adjust the amount of the loss, puts the insured to the expense and trouble of furnishing proofs of loss and plans of the building destroyed or duplicate invoices of merchandise destroyed, etc., etc., the company will then and thereby be estopped from relying upon the clause against additional insurance as a defense when sued upon the policy.[11] Likewise as to the condition against change of title,[12] encumbrances,[13] increase of risk,[14] vacancy,[15] the iron-safe clause[16] and false warranties in the application.[17]

(5) Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774; Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89.

(6) Tuttle v. Iowa State Traveling Men's Ass'n, 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223.

(7) Currie v. Cont'l Casualty Co., 147 Iowa 281, 126 N. W. 164, 140 Am. St. Rep. 300.

(8) Cleaver v. Traders Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Rudd v. American, etc., Ins. Co., 120 Mo. App. 1, 96 S. W. 237. Also cases in note four.

(9) Supreme Tent K. M. v. Volkert, 25 Ind. App. 627, 57 N. E. 203; Kidder v. Knight Templars, etc., Ins. Co., 94 Wis. 538, 69 N. W. 364.

(10) Crystal Ice Co. v. United Surety Co., 159 Mich. 102, 123 N. W. 619.

(11) Cleaver v. Traders Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Carpenter v. Continental Ins. Co., 62 Mich. 140, 28 N. W. 749; Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633; Replogle v. American Ins. Co., 132 Ind. 360, 31 N. E. 947; Webster v. Phoenix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479; Cannon v. Home Ins. Co., 53 Wis. 585, 11 N. W. 11; British-American Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

(12) Granger v. Manchester F. Assur. Co., 119 Mich. 177, 77 N. W. 693; Hollis v. State Ins. Co., 65 Iowa, 454, 21 N. W. 774; Scottish Union, etc., Ins. Co. v. Colvard, 135 Ga. 188, 68 S. E. 1097.

(13) McFarland v. Kittaning Ins. Co., 134 Pa. St. 590, 19 Atl. 766, 19 Am. St. Rep. 723; Niagara F. Ins. Co. v. Miller, 120 Pa. St. 504, 14 Atl. 385; Titus v. Gelns Falls Ins. Co., 81 N. Y. 410; Armstrong v. Ins. Co., 156 N. Y. 633, 51 N. E. 392; Walker v. Phoenix Ins. Co., 130 N. Y. 564, 29 N. E. 992.

(14) Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521; Roby v. Ins. Co., 120 N. Y. 510, 24 N. E. 808.

(15) Gans v. St. Paul Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Jerdee v. Cottage Grove F. Ins. Co., 75 Wis. 345, 44 N. W. 636; Home F. Ins. Co. v. Phelps, 51 Neb. 623, 71 N. W. 303; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; German-American Ins. Co. v. Evants, 25 Tex. Civ. App. 300, 61 S. W. 536.

(16) Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89; Marthinson v. North-British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291; Brown v. State Ins. Co., 74 Iowa 428, 38 N. W. 135, 7 Am. St. Rep. 495; Parsons v. Knoxville F. Ins. Co., 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; Roberts v. Sun Mutual Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Henderson v. Standard F. Ins. Co., 143 Iowa 572, 121 N. W. 714; McCollom v. Niagrara F. Ins. Co., 61 Mo. App. 352; Bowen v. Hanover F. Ins. Co., 69 Mo. App. 272; Corson v. Anchor, etc., Ins. Co., 113 Iowa 641, 85 N. W. 806.

(17) Hartford F. Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393; German Ins. Co. v. Gibson, 33